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Supreme Court, U.S.
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No. 97-957

In The

Supreme Court of the United States

October Term, 1997

TOYS "R" US, INC. and TRU (HK) LIMITED,

Petitioners,

vs.

YUSUF AHMED ALGHANIM & SONS, W.L.L.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Supreme Court should consider an argument which petitioner never presented in the courts below, *i.e.*, that a new standard of review, the clearly erroneous standard, should be applied by courts reviewing international arbitration awards.

2. Whether the Supreme Court should adopt a judicially intrusive clearly erroneous standard for the review of international arbitral awards notwithstanding thirty years of judicial authority, clear statutory provisions and Federal policy favoring international arbitration.

STATEMENT PURSUANT TO RULE 29.6

The petition accurately lists the parties to the proceedings.

Respondent Yusuf Ahmed Alghanim & Sons, W.L.L. (hereinafter "YAAS") is a privately held company. It has no parent companies or nonwholly owned subsidiaries or affiliates.

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STATEMENT OF THE CASE

This case presents what should be a routine and expeditious enforcement of an international arbitral award under the terms of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"), a treaty ratified and implemented by the United States. 21 U.S.T. 2517, T.I.A.S. 6997, 330 U.N.T.S. 3 (codified at 9 U.S.C. §§ 201-208). Petitioners, Toys "R" Us, Inc. and TRU (HK) Limited (collectively "TRU") initiated the arbitration pursuant to the terms of an arbitration agreement contained in contracts which TRU drafted. The arbitration, which lasted two and one-half years from the time TRU commenced proceedings in December 1993, involved extensive pre-hearing document discovery, 29 days of evidentiary hearings resulting in more than 5,000 pages of transcript, 800 documentary exhibits, extensive expert testimony and written reports on damages, and post-hearing submissions of over 300 pages. The experienced AAA arbitrator, William L.D. Barrett, issued a thorough and reasoned 47 page memorandum opinion addressing all of TRU's evidentiary, contractual and legal arguments. That memorandum opinion, which would withstand scrutiny under any standard of review, rejected TRU's arguments and awarded YAAS $46.4 million in damages, plus prejudgment interest at the statutory rate provided under New York law, based principally upon an analysis of what TRU actually was able to secure for itself when it sold the contract rights which were found to belong to YAAS (the "Award").

TRU refused to honor the Award, forcing YAAS to petition the District Court for recognition and enforcement under the Convention. In the District Court, and in the Court of Appeals, TRU argued that the Award should be overturned because the arbitrator had manifestly disregarded the applicable law and because the Award was completely irrational. These arguments were nothing more than attempts by TRU to retry the arbitration in the courts. The District Court confirmed the Award and the Court of Appeals for the Second Circuit affirmed.

TRU now seeks review by this Court, but not on the grounds that the Court of Appeals committed reversible error by failing to properly apply the existing law laid down by this Court. Rather, TRU argues for the first time that the standard of review which it sought to have applied by the courts below should now be changed to permit courts to refuse recognition and enforcement of international arbitration awards if those awards are "clearly erroneous."

TRU's assertion is at odds with the statutory framework established by Congress for the enforcement of arbitral awards. It is at odds with the prior decisions of this Court and all of the decisional law of the circuit courts of appeals. It is at odds with the overriding Federal policy in favor of arbitration, a policy which applies with particular force in the international arena. And it is premised on a fundamental mistrust of arbitration as an institution — a mistrust which this Court has repeatedly stated is at odds with modern law and policy. The Court of Appeals decision was correct and the petition for a writ of certiorari should be denied.

A. The Facts

In 1982, YAAS entered into a License and Technical Assistance Agreement (the "L&T Agreement") and a Supply Agreement (collectively, the "Agreements") with TRU with the intention of establishing and operating toy stores throughout the Middle East, a territory which included Saudi Arabia, Kuwait, the United Arab Emirates, Qatar, Oman, Bahrain, Yemen, Egypt, Sudan, Jordan, Lebanon, Syria, Iraq and Iran (the "Territory"). (A19, 80).[1] The Agreements were broad and far reaching. YAAS was granted the exclusive right to use all of TRU's trademarks and logos in

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1. References in the form "A__" are to the relevant pages of the Petitioners' Appendix. References in the form "RA__" are to the relevant pages of the Respondent's Appendix. References in the form "__ Tr. __" are to transcripts in the Record. References in the form "Petition at __" are to the petition for certiorari filed by TRU.

connection with the operation of the YAAS toy stores and was provided with exclusive access to all of TRU's know how, technology and expertise regarding all aspects of the retail toy business. In addition, the L&T Agreement obligated TRU to use its best efforts to make the YAAS Toy Store business profitable. (A19-20, RA6).

The Agreements also contemplated that YAAS could enter into partnerships with third parties to operate YAAS toy stores in the Territory, and that TRU would be required to provide the same rights and assistance with respect to those stores as to stores operated by YAAS alone. (A19, RA4).

The Agreements contained "Term and Termination" clauses which provided for the extension of the Agreements as long as YAAS opened a YAAS Toy Store every five or fewer years. (A21-22, 82).

Within months of executing the Agreements, YAAS invested substantial funds to start up and operate the toy business in Kuwait. Toy stores were opened in November 1983, April 1985, December 1985 and January 1988. (A4, 106-107). YAAS ordered, and TRU provided, merchandise for these stores. (A27). TRU only provided technical advice and assistance to facilitate the opening of the first store. YAAS nevertheless paid royalty and purchasing commissions for all of the stores. (A22, RA6-7).

Without the assistance of TRU, the toy stores were not profitable. To rectify the situation, in 1989, Amin Kadrie of YAAS conducted an extensive review of the toy operations and reached the conclusion that it was feasible to expand the toy business outside of Kuwait. Realizing that YAAS needed TRU's performance under the Agreements to make the existing stores profitable and to open additional stores in the Territory, Kadrie asked TRU for its assistance. But TRU refused to send a representative to Kuwait in response to Kadrie's request. Kadrie nonetheless concluded that

YAAS should remain in the toy business and that expansion of the business within the region presented a "very significant opportunity" for YAAS. (A30).

On August 2, 1990, before YAAS could turn around its operations and implement an expansion plan, Iraq invaded and occupied Kuwait. The country sustained major damage during the occupation. The many businesses operated by Alghanim, including the YAAS toy business, ground to a halt. One of the toy stores was burned to its foundation. Two other stores suffered severe fire and structural damage. All of the stores were looted, and tens of millions of dollars in inventory and equipment were destroyed. (A30).

Despite the devastation in Kuwait, YAAS quickly resolved to restore its operations after the liberation. In April 1991, YAAS notified TRU of its intention to reconstruct and operate the toy business. (A31). But, unbeknownst to YAAS, TRU had already concluded that the Middle East had enormous potential for development and that "YAAS's [exclusive] Agreements were blocking TRU from a gold mine." (A23). Indeed, by April 1991, TRU decided that the Agreements had to be terminated so that TRU could "have a free hand in the Territory." (A27). Certain, however, that YAAS would not voluntarily abandon its valuable rights under the Agreements, TRU devised a strategy "to stall, stonewall and obstruct YAAS while the clock ran out and the Agreements ended under their termination clauses." (A25).

Unaware of TRU's intentions, YAAS took a number of steps to restore and expand its toy business. YAAS reopened the one store that was mostly intact after the Gulf War. (A31). To accomplish a regional expansion, YAAS investigated sites for additional stores in Kuwait, the United Arab Emirates and Saudi Arabia. (A31-32).

In March 1992, Kadrie also determined that YAAS should reestablish its flagship store in Farwaniya, Kuwait which had been destroyed during the War. In May 1992, after TRU informed YAAS that TRU did not have the resources or interest to pursue a Middle

East expansion plan, a cost analysis of the Farwaniya project was prepared by YAAS. In July 1992, YAAS prepared an investment proposal, projecting a store opening by December 1, 1992. That proposal was approved by top management at YAAS in mid-July 1992, and YAAS notified TRU that it intended to proceed in accordance with the terms of the existing Agreements between the parties and that it would "pursue its 'immediate plans and priorities' — which included a plan to open stores in at least one more country." (A33).

On July 20, 1992, before YAAS could open a store, TRU issued a notice of termination, advising YAAS that the Agreements would expire on January 31, 1993. (A94-95). However, TRU soon learned from YAAS that its notice of termination was not timely, and that YAAS refused to relinquish its rights in the Territory. (A96-97). Therefore, TRU rethought its initial interpretation of the termination provisions and issued a second notice of nonrenewal that revised the expiration date to December 31, 1993. (A98-99).

But by solving one problem TRU created another: If the expiration date of the Agreements became December 31, 1993, YAAS would have 11 more months to open a store and automatically extend the Agreements for another five years. To prevent that, in early September, TRU "direct[ed] YAAS to cease any efforts to open any new YAAS Toy Stores in the territory . . ." (A99). TRU then threatened that a failure to heed that instruction could constitute grounds for an immediate termination of the Agreements and could subject YAAS to liability for monetary damages. (A99).

While the Agreements were still in effect, TRU sold the rights to the TRU trademarks and TRU's technical assistance and expertise — rights which belonged to YAAS — for six of the 14 countries in YAAS's Territory. Under these agreements, the two new franchisees, ATA Development Co. ("ATA") and Al-Futtaim Sons Co. LLC ("Al-Futtaim"), agreed to pay upfront fees of $30 million

and royalty and purchasing commissions based on the future operation of the new toy stores. (A28, 35). Under the Agreements with YAAS, TRU was entitled to royalty and purchasing commissions but was not entitled to any upfront fees.

B. The Proceedings Below

1. The AAA Arbitration

On December 20, 1993, TRU commenced an arbitration against YAAS, seeking a declaration that the Agreements would terminate on December 31, 1993. In response, YAAS counterclaimed for damages for breach of the Agreements. (A11).

On May 4, 1994, the arbitrator issued an eight page Partial Award, denying TRU's request for a declaratory judgment. (A1-9). The arbitrator found that under the termination provisions of the Agreements YAAS had the absolute right to open toy stores, even after a notice of termination, as long as the toy store was opened within five years of the last store opening. In that event, the Agreements by their terms would be extended for at least five more years. The arbitrator further held that, depending upon the proof submitted in subsequent evidentiary hearings, the initial term of the Agreements might be extended and the Agreements might have a longer term. (A8-9).

After the Partial Award was issued, the parties engaged in document and expert discovery, the exchange of Evidentiary Statements and motion practice. Thereafter, evidentiary hearings were held on the counterclaims asserted by YAAS. The hearings commenced in October 1994 and concluded in December 1995. After the hearings, the parties submitted extensive main briefs, reply briefs and proposed findings of fact and conclusions of law. Oral argument was held on May 7, 1996.

On July 10, 1996, the arbitrator rendered an Award, holding that TRU is obligated to pay YAAS $46,400,000 plus pre-Award interest thereon at the New York statutory rate of 9% per annum from December 31, 1994 through the date of the Award. (A48-49). The arbitrator also issued a 47 page memorandum in support of the Award in which he addressed each and every legal and factual issue arguably relevant to the arbitration. (A10-47).

2. The District Court Proceedings

On August 2, 1996, after TRU notified YAAS that it would not honor its payment obligations under the Award, YAAS filed a petition to confirm the Award under the Convention. TRU cross moved to vacate the Award, advancing three purported defenses to confirmation: (i) the arbitrator disregarded several provisions of the Agreements; (ii) the Award was rendered in "manifest disregard of the law;" and (iii) the Award was "completely irrational."

On December 13, 1996, the District Court issued a memorandum and order confirming the Award and denying TRU's cross motion to vacate or modify the Award. (A50-55). The District Court held that none of the limited grounds for vacating an arbitral award available under the Convention, or the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, had been established by TRU. (A51-52, RA1-4).

3. The Court of Appeals Proceedings

On December 19, 1996, TRU appealed the District Court's ruling on the same grounds that it had advanced in support of its motion to vacate or reduce the amount of the Award. YAAS opposed TRU's appeal, arguing that the FAA's implied grounds for vacatur — "clear irrationality" and "manifest disregard of the law" — were not applicable to an Award falling under the Convention. YAAS argued further that, even if such defenses were applied, the Award would have to be upheld and the District Court affirmed.

On September 10, 1997, the Court of Appeals issued an opinion and order affirming the District Court's confirmation of the Award. (A56-75). The Court of Appeals held that the FAA implied defenses of "manifest disregard of the law" and "clear irrationality" are not available under the Convention for international arbitral awards rendered in, or under the law of, a foreign jurisdiction. (A64). The court conversely held that, for international arbitral awards rendered in or under the laws of the United States, such as the Award at issue, the domestic arbitration laws and their implied defenses do apply. (A66). Applying those defenses, the Court of Appeals then carefully considered and swiftly rejected TRU's contentions, and held that the Award had not been rendered in manifest disregard of the law or in manifest disregard of the terms of the Agreements, and was not clearly irrational. (A70-75).

REASONS FOR DENYING THE WRIT

The petition's contention appears to be that courts should scrutinize international arbitral awards under a "clearly erroneous" standard of judicial review. (Petition at 14). That contention does not warrant consideration by this Court.

First, TRU asserts this argument for the first time in this Court. Absent compelling circumstances, which do not exist in this case, the Court should not consider arguments that were not presented and preserved in the lower courts.

Second, the existing more restrictive standard for vacatur of foreign arbitral awards is firmly rooted in 30 years of settled law and is, contrary to TRU's assertions, consistently applied in all of the circuits. Indeed, the standard advocated by TRU is beyond the authority granted by Congress for the review of arbitral awards.

Third, the arbitrator dealt exhaustively with the myriad arguments raised in the petition by TRU in the Partial Award and Memorandum supporting the final Award. His interpretations of

the contract, findings of fact and legal analysis not only were supported by the record before him, they were clearly correct. Thus, even under the novel standard of review proposed by TRU, the Award issued in favor of YAAS would have been confirmed by the District Court and upheld by the Court of Appeals.

Respondent respectfully requests that the Court decline to exercise jurisdiction and deny TRU's petition for a writ of certiorari.

I.

TRU SHOULD NOT ASSERT AN ARGUMENT FOR THE FIRST TIME IN THIS COURT.

In its petition for certiorari, TRU argues that the lower courts should have independently reviewed the merits of the dispute between the parties to the arbitration under a "clearly erroneous" standard of review. (Petition at 16). This argument was not asserted expressly or implicitly in either the District Court confirmation proceedings or in the Court of Appeals. Indeed, in both proceedings, TRU asked the courts to review the arbitrator's findings to determine whether he had manifestly disregarded New York's law of lost profits, manifestly disregarded the terms of the Agreements or made findings of fact on damages that were completely irrational. (A51, 73-75). It is only because those arguments failed that TRU now urges a different standard of review, a standard which has never been applied by a United States court reviewing an arbitral award.

This Court generally has declined to consider matters that were not presented and preserved in the lower courts in the absence of compelling or extraordinary circumstances. *See, e.g., Davis v. United States*, 495 U.S. 472, 489 (1990) (because the agency argument was "neither raised before nor decided by the Court of Appeals, we decline to address it here"); *Patrick v. Burget*, 486 U.S. 94, 100 n.5 (1988) (Court refused to consider evidentiary

issue not passed upon by the lower court); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) (because defendants had failed to raise in the Court of Appeals the issue as to whether denial of their costs was an abuse of discretion, the issue was not properly before the Supreme Court).

This case clearly does not present the type of extraordinary circumstances which this Court has deemed to be sufficient to override this prudential limitation. *Cf. Wood v. Georgia*, 450 U.S. 261, 265 n.5 (1981); *United States v. Mendenhall*, 446 U.S. 544, 551 n.5 (1980). *See generally* Robert L. Stern & Eugene Gressman, *Supreme Court Practice* § 6.27 (5th ed. 1978) ("the Court doubtless limits its power to notice plain error to those situations where it feels the error is so serious as to constitute a fundamental unfairness in the proceedings"). TRU has not alleged, and cannot demonstrate, that a fundamental unfairness in the proceedings will result if this Court declines to consider its new argument. Indeed, TRU does not even contend that there was error — much less serious error — in the courts below; it simply argues that the award would have to be overturned if, and only if, a clearly erroneous standard of review were applied to the contract interpretation and findings of fact made by the arbitrator. (Petition at 17).

TRU's new argument should not be considered for the first time in this Court. The petition should be denied.

II.

A CLEARLY ERRONEOUS STANDARD OF REVIEW IS AT ODDS WITH THE PRIOR DECISIONS OF THIS COURT AND THE COURTS OF APPEALS AS WELL AS APPLICABLE STATUTES AND FEDERAL POLICY FAVORING ARBITRATION.

Obviously disappointed with the results of the arbitration and the decisions of the courts below which correctly applied existing law, TRU now argues that the Court should jettison the well

established principle of limited judicial review of arbitral decisions in favor of a new standard of review. (Petition at 16). TRU justifies this radical departure from existing law with the twin assertions that arbitration has become increasingly lawless and that there is division among the Circuit Courts concerning the manifest disregard of the law standard of review. (Petition at 10-11). Both assertions are baseless.

TRU's claim that arbitrators are incapable, and perhaps even unwilling, to accurately apply the law has no empirical support. Not only is it manifestly false, it is premised on the same mistrust and suspicion of the arbitral process that this Court has explicitly rejected. In *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), it was asserted that claims arising out of the anti-fraud provisions of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 were not arbitrable because these statutory rights implicated complex legal principles that arbitrators would have difficulty in applying. Indeed, this had been an underpinning of this Court's original decision in *Wilko v. Swan*, 346 U.S. 427 (1953), which held that claims arising under the Securities Act of 1933 were not arbitrable. The Court rejected those assertions, stating:

> It is difficult to reconcile *Wilko*'s mistrust of the arbitral process with this Court's subsequent decisions involving the Arbitration Act. *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* [473 U.S. 614 (1985)] [citations omitted]. Indeed, most of the reasons given in *Wilko* have been rejected subsequently by the Court as a basis for holding claims to be nonarbitrable. In *Mitsubishi*, for example, we recognized that arbitral tribunals are readily capable of handling factual and legal complexities of antitrust claims, notwithstanding the absence of judicial instruction and supervision. *See* 473 U.S., at 633-634. Likewise, we have concluded

> that the streamlined procedures of arbitration do not entail any consequential restriction on substantive rights. *Id.*, at 628. Finally, we have indicated that there is no reason to assume at the outset that arbitrators will not follow the law; although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to insure that arbitrators comply with the requirements of the statute.

482 U.S. at 231-232. The Court went on to state, "the mistrust of arbitration that formed the basis for the *Wilko* opinion in 1953 is difficult to square with the assessment of arbitration that has prevailed since that time." *Id.* at 233. Thus, TRU's assumption that a new stricter standard of review is necessary to insure that arbitrators comprehend and follow the law in international disputes has already been resolved by this Court.

TRU's assertion that there is a split and confusion among the Circuit Courts of Appeals concerning the standard of review to be applied to arbitral decisions also is without merit. Eleven out of the twelve Courts of Appeals have recognized that "manifest disregard of the law" by the arbitrator is an appropriate reason to vacate an arbitral award. In addition, these courts are consistent in formulating the standard, *i.e.*, that the arbitrator's decision must constitute a conscious disregard of a recognized controlling legal principle rather than a mere error of law. *See Prudential-Bache Securities, Inc. v. Tanner*, 72 F.3d 234 (CA1 1995) (arbitrator's finding that executives of brokerage house had been wrongfully discharged was not in manifest disregard of the law and therefore award was confirmed); *Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp.*, 103 F.3d 9 (CA2 1997) (arbitrator's finding that licensee was not entitled to benefits under most-favored-licensee clause in agreement was not in manifest disregard of the law and should have been confirmed); *United Transport Union, Local 1589 v. Suburban Transport Corp.*, 51 F.3d 376 (CA3 1995) (district court's vacatur of award reversed as arbitrator's

decision to reinstate bus driver involved in multiple accidents was not in manifest disregard of the law); *Upshur Coals Corp. v. United Mineworkers of America, Dist. 31*, 933 F.2d 225 (CA4 1991)[2] (district court's vacatur of award reversed because arbitrator's finding that employer must continue to pay accrued health benefits to laid-off employees after the expiration of the collective bargaining agreement was not in manifest disregard of the law); *M & C Corp. v. Erwin Behr GmbH & Co.*, 87 F.3d 844 (CA6 1996) (recognizing manifest disregard of the law as a rationale for reversal under the Federal Arbitration Act); *National Wrecking Co. v. International Brotherhood of Teamsters, Local 731*, 990 F.2d 957 (CA7 1993) (employer's motion to vacate arbitrator's finding that truck driver's vision met Department of Transportation minimum standards denied, as arbitrator's legal conclusions will not be disturbed absent manifest disregard of the law); *Lee v. Chica*, 983 F.2d 883 (CA8), *cert. denied*, 510 U.S. 906 (1993) (district court set aside arbitrator's award of punitive damages for violations of Securities Exchange Act and court of appeals reversed because award not completely irrational or in manifest disregard of the law); *Barnes v. Logan*, 122 F.3d 820 (CA9 1997) (arbitrator found against broker in dispute alleging mismanagement of customer's securities account and courts affirmed as they could only have set aside this finding if arbitrator manifested complete disregard of the law); *Denver & Rio Grande Western Railroad Co. v. Union Pacific Railroad Co.*, 119 F.3d 847 (CA10 1997) (court of appeals would not overturn arbitrator's finding of liability in multi-train collision as judicial review of arbitration awards is among the narrowest known to the law and such awards may be overturned only on very limited grounds, including manifest disregard of the law); *Montes v.*

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2. TRU's statement that the Fourth Circuit has rejected the manifest disregard of the law standard, citing to *Remmey v. PaineWebber, Inc.*, 32 F.3d 143 (CA4 1994), *cert. denied*, 513 U.S. 1112 (1995) is mistaken. (Petition at 11). In fact, in *Remmey*, the Fourth Circuit made clear that manifest disregard of the law is an accepted ground for challenging an arbitral award, citing *Upshur Coals Corp.* as controlling authority for the proposition. 32 F.3d at 149.

Shearson Lehman Bros., Inc., 128 F.3d 1456 (CA11 1997) (employee's petition to vacate arbitration decision denying her claim for overtime pay granted because arbitrators recognized express request by employer's counsel to disregard the prevailing law); *Al-Harbi v. Citibank, N.A.*, 85 F.3d 680 (CADC), *cert. denied*, 117 S. Ct. 432 (1996) (arbitrator's award of $1.1 million to plaintiff in suit alleging breach of fiduciary duty was not in manifest disregard of the law and thus was upheld by court of appeals).[3]

The scope of judicial review of arbitral awards is consistent throughout the circuits. And contrary to the assertion of TRU (Petition at 16), the commercial world needs no clarification of that scope in order to make intelligent decisions about whether to submit controversies to arbitration. Anyone with a passing familiarity with the law of arbitration knows that judicial review of awards is narrow and limited. Indeed, as this Court recognized in *Mitsubishi*, a party which opts for arbitration knowingly "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." 476 U.S. at 628.

The adoption of the new and intrusive scope of review advocated by TRU would create turmoil and uncertainty in the commercial world. TRU's clearly erroneous standard would transform arbitral tribunals into mini-trial courts whose findings would be subjected to rigorous judicial scrutiny. The courts concommitantly would be drawn into each arbitration, required to engage in an in-depth substantive review of the proceedings to determine if the arbitrator's contract interpretations and findings of

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3. Only the Fifth Circuit appears to have refused to adopt the manifest disregard standard as a *separate* basis for vacating an arbitral award, restricting the grounds available to those explicitly set forth in 9 U.S.C. § 10. *R.M. Perez & Associates, Inc. v. Welsh*, 960 F.2d 534, 539-40 (CA5 1992). However, we have found no case in which the Fifth Circuit has enforced an award in which the arbitrator acknowledged controlling law and declined to apply it.

fact and law are accurate.[4] The principle of finality of arbitral awards would be destroyed. The disruption would be particularly acute in the international commercial sphere. Foreign parties, which often agree to arbitration rather than submit themselves to the jurisdiction of United States courts, would now be faced with the injection of the United States judiciary into a process they previously viewed as more neutral. In sum, the standard advocated by TRU would undermine, not enhance, arbitration as an effective method of international dispute resolution.

The foregoing is sufficient to dispose of TRU's contention that the Court should consider changing the existing standard of review of arbitral awards. However, there is another significant reason to deny TRU's petition. The clearly erroneous standard of review cannot be supported by the governing statutory authority.

Congress has set out in the FAA a well established statutory scheme for the enforcement of arbitration agreements and arbitral awards. 9 U.S.C. § 10 sets out the available grounds for vacating an arbitral award.[5] (A79). Courts have some latitude in interpreting

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4. The extra burden imposed on the courts would be enormous. As TRU points out (A10), in 1996, the American Arbitration Association alone administered a total of 70,516 cases. Under TRU's standard, a court would have to thoroughly and meticulously review the record of each case to see if any decisions of the arbitrator were clearly erroneous. This creates a potential for more than 70,000 additional cases for the courts each year.

5. This assumes that the grounds set forth in 9 U.S.C. § 10 are available to attack an award rendered under the Convention, a point which YAAS does not concede. YAAS argued in the Court of Appeals that the grounds asserted by TRU in attacking the award could not apply in this case because those grounds find their source in the FAA. Because the award at issue is an international award within the terms of the Convention and the grounds for denying enforcement

(Cont'd)

the statutory provisions and indeed "manifest disregard of the law" is, in some respects, a judicially created addition to the grounds articulated in the statute. However, manifest disregard of the law itself is firmly rooted in the provisions of the FAA, for if an arbitrator has recognized that a point of law exists and controls an issue, and simply refuses to apply it, the arbitrator is guilty of misconduct, 9 U.S.C. § 10(a)(3), has exceeded his powers, or has imperfectly executed them, 9 U.S.C. § 10(a)(4).[6]

Indeed, the context of this Court's statement in *Wilko v. Swan, supra,* regarding manifest disregard of the law was the recognition that a United States court lacks the statutory authority to review arbitrators' decisions for legal error:

> In unrestricted submission, such as the present margin agreements envisage, the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation. The United States Arbitration Act contains no provision for judicial determination of legal issues such as is found in the English law.

346 U.S. at 436-37.

(Cont'd)
of such an award found in Article V are exclusive, under the terms of the Convention as well as under the implementing legislation, 9 U.S.C. § 207, the FAA provisions do not apply. The Court of Appeals disagreed, holding that the grounds for setting aside an award found in 9 U.S.C. § 10 may apply to an award governed by the Convention if the award is rendered in the United States. (A66).

6. TRU's statement that some showing of misconduct by the arbitrator is required under the manifest disregard standard is correct. (Petition at 12). That ground is expressly articulated in the FAA, and is the standard by which courts are bound.

Thus, the very standard advocated by TRU exceeds the authority granted by Congress to the courts to review arbitral awards. TRU's petition should be denied.

III.

THE ARBITRAL AWARD WOULD BE CONFIRMED EVEN UNDER A CLEARLY ERRONEOUS STANDARD OF REVIEW.

As demonstrated in Point II *supra*, the clearly erroneous standard of review should not be applied by appellate courts reviewing foreign arbitral awards. However, even assuming *arguendo* that the standard of review proposed by TRU had been applied by the lower courts to assess the validity of the Award, the Award would have been confirmed.

In the first instance, TRU provides no contours to the clearly erroneous standard of review that it advocates. The clearly erroneous standard is one applied by Courts of Appeals in reviewing District Court findings of fact. Fact findings are determined to be clearly erroneous if, and only if, an appellate court has "a definite and firm conviction that a mistake has been committed." *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 623 (1993). This standard requires an appellate court to defer to the lower court even if the court believes it would have assessed the evidence differently or reached a different conclusion. Indeed, as long as the lower court's assessment of the evidence is

> plausible in light of the record viewed in its entirety, the [reviewing court] may not reverse it even though convinced that had it been sitting as the trier of fact it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Anderson v. Bessemer City, 470 U.S. 564, 574-75 (1984). *Accord United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949) ("A choice between two permissible views of the weight of the evidence is not 'clearly erroneous.' "). Therefore, even if the TRU standard was applied, the arbitrator's determinations would be presumed to be correct and could not be overturned simply because a court may have a different view. As long as there is support in the record, the award would have to be confirmed.

In this case, the arbitrator issued an extensive and well reasoned 47 page opinion in support of the final Award. (A10-47). In that opinion, he expressly referred to and interpreted all of the relevant contractual provisions, cited to and applied the controlling legal authority in New York for damages based upon lost profits, judged the demeanor of the witnesses called by both sides, and thoroughly weighed the evidence submitted during the hearings, ultimately ruling in favor of YAAS. The arbitrator's findings cannot be overturned for clear error because they are completely supported by the record.

A. The Arbitrator's Liability Findings Were Not Clearly Erroneous.

TRU claims that errors were made by the arbitrator when he interpreted the contractual provisions of the L&T Agreement against TRU. Principally, TRU contends that the arbitrator erroneously interpreted paragraphs 8.01 and 2.07 of the L&T Agreement. (Petition at 17). But there is no evidence to suggest that the arbitrator misinterpreted these contract provisions. Rather, he simply rejected TRU's proffered interpretations for those provisions because there was no evidence to support them.

1. Paragraph 8.01 of the L&T Agreement

The arbitrator's interpretation of paragraph 8.01 is supported by the plain language of the L&T Agreement and by other evidence

offered at the proceedings. In fact, the Partial Award makes clear that the arbitrator considered the contract language as well as a record that was jointly agreed upon and submitted by the parties. (A12). In rejecting TRU's construction of paragraph 8.01 — the same construction that TRU proffers here — the arbitrator found that YAAS and TRU agreed that "the 'initial period' could continue indefinitely for successive five year periods if YAAS actually continued to open stores during the initial period." (A6). The arbitrator also found that TRU could not divest YAAS of any of the rights it had under the Agreements, including the right to open new stores, by issuing of a notice of nonrenewal, whether timely or not.[7] (A7). Thus, the arbitrator interpreted paragraph 8.01 to permit YAAS to extend the initial term of the Agreements by opening "a new store at any time up to the last day of the initial period . . ." (A6-7).

Even a cursory review of the Partial Award, which was devoted exclusively to this issue, demonstrates that the arbitrator was absolutely right in his interpretation of these provisions. But even if he was not, TRU has not demonstrated that the arbitrator's interpretation of paragraph 8.01 was unsupported by the language in the L&T Agreement. At most, TRU has argued that the arbitrator should have reached a different conclusion. This baseless assertion does not demonstrate that the arbitrator's interpretation of paragraph 8.01 was clearly erroneous.

2. Paragraph 2.07 of the L&T Agreement

TRU also repeats its argument that the arbitrator misinterpreted and disregarded paragraph 2.07(b) of the L&T Agreement, which obligated YAAS to consult with TRU about the "location, size, design, construction and layout" of the stores and to comply with TRU standards for those stores. (Petition at 17). Thus, according to TRU, the arbitrator was wrong when he found that "[TRU] had invoked paragraph 2.07 of the agreement as a 'mere pretext to

7. TRU's first notice of nonrenewal was not timely. (A13).

make it *impossible* for [YAAS] to fulfill the condition for extension of the initial term." (Petition at 17).

There is no evidence that the arbitrator misinterpreted paragraph 2.07 or erred when he found that TRU, *after it had issued a notice of termination*, invoked the conforming stores provision solely to prevent YAAS from opening a store and extending the Agreements. Indeed, the evidence suggests that TRU's interpretation of the provision was irrelevant to the arbitrator's analysis. As the arbitrator observed:

> I am not persuaded that the stores contemplated in the Agreements in 1982 were what TRU currently characterizes as "conforming" stores. Moreover, the whole course of dealing between TRU and YAAS over the period from 1982 to 1992 shows that TRU did not care at all about the size, shape or location of YAAS's toy stores. . . . TRU has abandoned YAAS to practical autonomy regarding toy stores in the Territory. TRU was being compensated under the Agreements by royalties and commissions, payable whether or not YAAS's toy stores were profitable. Given this background, I find that TRU's insistence, after it had given notice of termination, on holding YAAS to its current standards for "conforming" stores is a mere pretext to make it impossible for YAAS to fulfill the condition for extension of the initial term.

(A29). Simply put, the arbitrator found that TRU was estopped from relying on the conforming stores provision because it ignored those standards over the course of the Agreements and then attempted, by its deception and nonperformance, to prevent YAAS from meeting those supposed standards.

TRU further claims the arbitrator ignored undisputed evidence that YAAS could not have opened a toy store in time to extend the

Agreements. (Petition at 17). TRU is wrong and fails to inform the Court that the record contained ample evidence that YAAS could have opened a store in the four and one-half months between the time TRU issued its notice of termination and the expiration of the initial term of the Agreements. (A30-34; Staley Tr. 2687, 2671-72). As the arbitrator held:

> Could YAAS have opened a toy store between September 2, 1992 and January 16, 1993? I find that it could have.
>
> YAAS is a large well-financed organization. At the time in question it owned substantial real estate in Kuwait and by leasing could have had access to other real estate. One of its affiliates was a large construction firm. Given that the rights YAAS had were so valuable and that to extend the initial term for five more years required merely the opening of a single toy store, I find that YAAS could and would have mustered sufficient capital and manpower to accomplish this relatively modest task.

(A29-30).

B. The Arbitrator's Damages Findings Were Not Clearly Erroneous.

TRU also claims that the arbitrator's findings on damages were irrational because: (i) YAAS lost money during its ten year relationship with TRU; and (ii) YAAS "asked for only $2 million to relinquish its rights under its contract with [TRU] in September 1993, a full year *after* [TRU's] alleged breach of contract." (Petition at 18-19). TRU also argues that the arbitrator's application of the leading lost profits case in New York, *Kenford Co. v. County of Erie*, 67 N.Y.2d 257, 502 N.Y.S.2d 131 (1986), "was just plain wrong." (Petition at 19). TRU's arguments are devoid of merit.

First, it was not error under New York law for the arbitrator to award damages to a business with a limited history of profits. In fact, it would have been error for the arbitrator to refuse to award damages simply because YAAS lost money. In *Lamborn v. Dittmer*, 873 F.2d 522, 533 (CA2 1989), the Court of Appeals found that plaintiffs proved damages with sufficient certainty, even though plaintiffs' commodities partnership had sustained substantial losses, because the partnership had shown an upward trend in the six months before defendant unilaterally terminated the relationship. *See also Autowest, Inc. v. Peugeot, Inc.*, 434 F.2d 556, 567 (CA2 1970). TRU offers no contrary authority.

YAAS was profitable after the Gulf War. (A105). Moreover, as the arbitrator expressly found, YAAS likely would have turned a profit much sooner if TRU had not "stall[ed], stonewall[ed] and obstruct[ed]" YAAS's efforts throughout their relationship. (A25) Accordingly, YAAS's losses over the life of the Agreements were not material to the arbitrator's analysis.

Second, TRU's statement that YAAS valued the toy business at $2 million is patently false. In 1993, after TRU had breached the Agreements, YAAS and TRU discussed a $2 million payment for the inventory YAAS had on hand after termination. The figure was not based upon an assessment of the value of the toy business in 1993. Significantly, TRU did not put it *any* evidence to the contrary. Indeed, its own witness, Keith Van Beek, testified that the value of YAAS's operating losses was $2 million. (A109). Mr. Van Beek did not testify, as TRU here suggests, that Mr. Kadrie had valued the toy business at $2 million.

The arbitrator expressly ruled that there was no evidence of a $2 million buyout. (A24). Reviewing the record, the Court of Appeals concurred with the arbitrator:

> As to the purported $2 million buyout offer, no witness has testified that the $2 million figure was

> an estimate of the value of [YAAS's] toy business. Kadrie, the primary [YAAS] officer involved with the toy business, testified that, in his understanding, settlement with [TRU] would serve to provide [YAAS] "some relief on the cost of liquidating [its] inventory." [citation omitted] Accordingly, [YAAS] argues that $2 million was the value [YAAS] placed on its inventory at the time. Furthermore, according to a [TRU] executive, Kadrie, in making this offer, expressly stated that the $2 million was to recoup losses [YAAS] had incurred in trying to develop the business. Therefore, there is no proof that this figure was [YAAS's], or anyone else's, estimation of the value of the business. Thus, the arbitrator did not manifestly disregard lost profits law in refusing to treat the $2 million figure as a buyout offer.

(A73-74).

The arbitrator's analysis of the lost profits law of New York also survives the strictest scrutiny. The arbitrator considered, cited and applied a leading case on damages in New York, *Kenford Co. v. County of Erie*, 67 N.Y.2d 257, 502 N.Y.S.2d 131 (1986), before he determined an appropriate damages figure. Under *Kenford* and its progeny, lost profits may be awarded as damages in a breach of contract action, unless the lost profits calculations are found to be too speculative. *See Ashland Management v. Janien*, 82 N.Y.2d 395, 403, 604 N.Y.S.2d 912, 916 (1993); *Kenford*, 67 N.Y.2d at 261, 502 N.Y.S.2d at 132; *Int'l Telepassport Corp. v. USFI, Inc.*, 89 F.3d 82, 85 (CA2 1996). TRU does not claim that the arbitrator did not understand the lost profits law; rather, TRU alleges that the arbitrator erred when he refused to find that the damages sought by YAAS were speculative. (Petition at 19). This contention has no merit.

The arbitrator, applying *Kenford*, found that damages were not precluded in this case because YAAS's damage calculations

were premised on very detailed business projections prepared by TRU (Exhibit 1015) prior to its breach of the YAAS Agreements. (A35, 37-38). The New York Court of Appeals has held that this type of damage evidence is reliable and sufficiently certain evidence of lost profits. *Ashland Management*, 82 N.Y.2d at 406, 604 N.Y.S.2d at 917. Accordingly, the arbitrator did not misunderstand or misapply the law of damages in New York.

Moreover, there is substantial evidence in the record supporting the Award as a whole and each of the individual components of the Award. Indeed, the centerpiece of the damages case presented by YAAS's expert, Robert Sherwin, was Exhibit 1015, a 12 year pro forma prepared by TRU that projected the operating results associated with the opening of TRU toy stores in YAAS's territory. (A37-39).

In discussing Mr. Sherwin's expert opinion, the arbitrator made the following findings about TRU's Exhibit 1015:

> I found that Mr. Sherwin's report and testimony were credible in the main and that I can place reliance on his report and testimony in fashioning the award that I have determined is the fair outcome of this case.
>
> * * *
>
> Mr. Sherwin performed two alternative calculations of YAAS's damages that may be called, respectively, the "Cash Flow Analysis" and the "Franchise Fee Analysis."
>
> For the Cash Flow Analysis, Mr. Sherwin performed a damage calculation to measure what YAAS would have earned if, in the absence of TRU's breach, YAAS had been able to continue its

operations in Kuwait, to expand those operations, and to develop retail operations in other countries in the Territory, either directly or in joint venture with qualified local companies in those countries.

* * *

Mr. Sherwin based his cash flow projections on Exhibit 1015. This exhibit, as noted above, prepared by Mr. Van Beek . . . was used by TRU to negotiate the up-front franchise fees to be paid by prospective purchasers and to calculate the royalty and purchasing commissions TRU would receive over the life of the franchises. I find that Exhibit 1015 is reliable. In concluding two substantial sales TRU itself used Exhibit 1015 for pricing purposes. It is therefore an inherently reliable document and contains inherently reliable information for purposes of calculating an income stream from new stores in the Territory with reasonable certainty. I find that Mr. Sherwin's reliance on Exhibit 1015 resulted in a cash flow projection for the Territory which is reasonably certain.

* * *

It is not necessary to agree with TRU to conclude that the Franchise Fee Analysis is based on much more conservative assumptions. It assumes that willing third parties would have independently evaluated the projected income streams from the point of view of 1993, as reflected in Exhibit 1015, and would have priced their expectations at that time in the same manner as the two organizations with which TRU actually concluded sales. This assumption, which I find reasonable, looks to the

> question what would a willing third party have paid YAAS for these rights at the time of the breach?
>
> The future risks to the income stream may still have been present. However, it is not disputed that independent third parties were willing, at that time, to calculate their own discount of those risks, and in arms length bargaining, to agree to pay substantial prices for the projected cash flows. TRU accepted those prices. I find that this alternative, while it may well be less than fair to YAAS in not fully reflecting what it could have achieved, is firmly rooted in documented past events. I believe it is the preferable basis for damages in this case, and I so find.

(A36-37, 40).

Thus, there is reliable and uncontroverted evidence supporting YAAS's lost profits calculations. Further, notwithstanding TRU's mischaracterization of the damages award (petition at 17), YAAS was not simply awarded damages for lost profits. (A40, 47). Nearly 60% of the damages (or $27,580,000) is derived from Mr. Sherwin's "Franchise Fee Analysis" and is based on the upfront fees ATA and Al-Futtaim agreed to pay TRU for the right to open TRU toy stores in Saudi Arabia, the United Arab Emirates, Qatar, Bahrain and Oman. These fees are not speculative and, as the arbitrator found, it was rational for YAAS's expert to assume from the " 'feeding frenzy' to open toy stores in the region," that YAAS would have been able to secure suitable partners that

> would have independently evaluated the projected income streams from the point of view of 1993, as reflected in Exhibit 1015, and would have priced their expectations at that time in the same manner as the two organizations with which TRU actually concluded sales.

(A40-42).

In sum, a review of the arbitrator's decision demonstrates that he carefully considered the evidence offered during the damages phase of the arbitration. His conclusion that the Award "may well be less than fair to YAAS in not fully reflecting what it could have achieved, [but which] is firmly rooted in documented past events" (A40), was based on controlling principles of New York law and ample factual support.

The Award can hardly be characterized as clearly erroneous. Each of the arbitrator's determinations is supported by the evidentiary record and governing law. Even if the petition were to be granted, the decision of the Court of Appeals would have to be affirmed. TRU's petition should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

RESPONDENT'S APPENDIX — TREATIES, STATUTES AND CONTRACTUAL PROVISIONS INVOLVED

Treaties and Statutes

United Nations Convention On The Recognition And Enforcement Of Foreign Arbitral Awards

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differencs between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought. [remainder of article omitted]

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

21 U.S.T. 2517, T.I.A.S. 6997, 330 U.N.T.S. 3.

Respondent's Appendix

Chapter 2 of the Federal Arbitration Act

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.

9 U.S.C. § 201 (1997).

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

9 U.S.C. § 202 (1997).

Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

9 U.S.C. § 207 (1997).

Chapter 1 applies to actions and proceedings brought under this chapter to the extent that that chapter is not in conflict with this chapter or the Convention as ratified by the United States.

9 U.S.C. § 208 (1997).

Contractual Provisions

Additional pertinent provisions of the License and Technical Assistance Agreement Between Toys "R" Us, Inc., TRU (HK) Limited and Yusuf Ahmed Alghanim & Sons, W.L.L., signed and executed on November 16, 1982 in New York, New York, are as follows:

1.08 "YAAS Toy Store" means a retail store engaged primarily in selling TRU-type merchandise, owned or controlled by YAAS or an affiliate thereof, or by any legal entity formed by YAAS or any partner or affiliate of YAAS and other third parties for the purpose of opening a toy store in any country of the territory, [remainder of section omitted]

* * *

3.01 TRU shall provide YAAS during the term of this Agreement with technical advice and assistance pertaining to the establishment, maintenance, operation, development and expansion of YAAS Toy Stores in the Territory.

3.02 TRU shall render advice and assistance to YAAS, initially and on a continuing basis at such times as YAAS reasonably requests during the term of this Agreement, with a view toward helping YAAS realize

success and profitability in its toy business in the territory.

3.03 Without limiting the generality of Sections 3.01 and 3.02, TRU shall render advice to YAAS in the following areas: establishment of initial operating procedures and the revision thereof as changes develop in the art of toy trade and retailing or areas of policy within the territory; establishment of performance guidelines; management training; site planning and selection; office and warehouse procedures; merchandising; store layout and fixturing; marketing; advertising; sales promotion; inventory control and replenishment systems; cost and overhead control systems; cost data for capital goods, equipment and supplies; and methods of employee compensation and incentives.

3.04 At the request of YAAS, TRU shall send to the territory at any time upon reasonable notice, for any reasonable length of time, such of TRU's qualified personnel as TRU deems necessary to render the technical advice and assistance required by YAAS. Such personnel shall act in a consulting capacity only and shall not be responsible for the supervision of personnel employed by YAAS. The salaries and other compensation of all such TRU personnel shall be borne by TRU during the entire term of this Agreement. YAAS shall bear all reasonable board, lodging and local travel expenses of such personnel (in a manner befitting the individuals involved) while they are in the territory. [remainder of section omitted]

* * *

4.01 Although it is in the interests of both parties that the YAAS Toy Store business be financially successful, YAAS recognizes that it alone bears the responsibility for raising the necessary capital to finance the business (including the purchase of merchandise), acquiring or constructing the necessary store and warehouse facilities, and retaining the necessary management and other personnel for the operation of the business. YAAS acknowledges that, except for the services which TRU has specifically agreed in this Agreement to provide, TRU has no obligation, financial or otherwise. YAAS also acknowledges that TRU's decision to participate in the Toy Store business as set forth in this Agreement is predicated on the understanding that YAAS will use its best efforts to make the YAAS Toy Store business profitable.

Likewise, TRU acknowledges that YAAS's decision to resort to TRU's services as hereunder set forth is predicated on the understanding that TRU will use its best efforts within its areas of responsibility under this Agreement to make the YAAS Toy Store business profitable.

* * *

5.01 YAAS will pay TRU a fee equal to three per cent (3%) of all net sales of (a) all merchandise sold at retail by YAAS Toy Stores in the territory during the term of this Agreement and (b) all TRU-type merchandise sold by YAAS pursuant to Section 4.03(a) and (c) during the term of this Agreement, [remainder of Section omitted]

* * *

7.01 TRU agrees that, during the term of this Agreement, it will not enter into any other agreement with any person providing for the granting of trademark licenses or the furnishing of technical advice and assistance with respect to any toy store business in the territory.

The pertinent provisions of the Supply Agreement Between TRU (HK) Limited and Yusuf Ahmed Alghanim & Sons, W.L.L., signed and executed on November 16, 1982 in New York, New York, are as follows:

2.01 Subject to Section 2.02, YAAS will order and purchase through TRU-HK YAAS's requirements of TRU-type merchandise for all YAAS Toy Stores in the territory.

* * *

3.01 YAAS will pay TRU-HK compensation equal to five per cent (5%) of TRU-HK's invoice price of all merchandise purchased by YAAS through TRU-HK during the term of this Agreement. [remainder of section omitted]

* * *

4.01 TRU-HK agrees that, during the term of the Agreement, it shall not sell at wholesale, distribute or consign any TRU-type merchandise to any person in the territory except YAAS. TRU-HK further agrees not to effect such sales, distributions or consignments under circumstances known to TRU-HK which make it likely that such merchandise will be sold in the territory, [remainder of section omitted]

* * *

6.10 In the event of any dispute or difference of opinion between the parties arising out of or in connection with this Agreement, each of the parties shall use its best efforts to settle such dispute or difference of opinion amicably by negotiation. All disputes which cannot be amicably settled by negotiation shall be finally settled by arbitration to be held in New York City in accordance with the Rules of the American Arbitration Association, and judgment upon any award rendered in any such arbitration may be entered in any court of competent jurisdiction.